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# In the Supreme Court of the United States

OCTOBER TERM, 1959

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EDGAR ALLEN WEST, PETITIONER

*v.*

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 8-20) is reported at 143 F. Supp. 473. The opinion of the Court of Appeals for the Third Circuit (R. 135-139) is reported at 256 F. 2d 671.[1]

[1] The original opinion of the Court of Appeals remanding the case for more precise findings (R. 129-131) is reported at 246 F. 2d 443. The order of the District Court upon remand, amending its findings of fact (R. 131-132), is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1958 (R. 139). On September 9, 1958, Mr. Justice Brennan entered an order extending the time for filing a petition for a writ of certiorari in this case until November 29, 1958 (R. 140). The petition for a writ of certiorari was filed on November 28, 1958, and granted on March 2, 1959 (R. 140; 359 U.S. 924). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the courts below correctly declined to permit recovery against the shipowner of a deactivated vessel for an alleged breach of a warranty of seaworthiness in a suit brought by a shoreside marine engineer, employed by the ship repair contractor, where at the time of the injury the vessel was completely out of navigation and docked at a pier for reactivation repairs and where the shore-based worker was engaged in the performance of major repairs on the vessel and was injured by an article which was among the items specified to be inspected, tested, and repaired by the ship repair contractor.

2. Whether the courts below correctly determined that the shipowner was not negligent in the circumstances of this case.

## STATEMENT

This action, filed pursuant to the Public Vessels Act, 46 U.S.C. 781, *et seq.*, was instituted by petitioner by a libel *in personam* against the United States as owner of the liberty ship, S.S. MARY AUSTIN (R. 2-6). The libel sought damages for injuries sustained during petitioner's employment on the MARY AUSTIN and was es-

sentially based on the allegations that the vessel was unseaworthy and that employees of the United States had been negligent (R. 4-5). The United States answered the libel generally denying the allegations of unseaworthiness and negligence (R. 6-8); in turn, relying on an express indemnification clause in the repair contract, the United States impleaded the reactivation repair contractor, petitioner's employer, Atlantic Port Contractors, Inc. (R. 121-124).

The undisputed basic facts, as established by the findings of the District Court which were upheld on appeal by the Court of Appeals, are as follows:

Sometime after the cessation of hostilities in World War II, the liberty ship, S.S. MARY AUSTIN, was completely deactivated by the United States and placed in the "moth ball fleet" located in the James River at Norfolk, Virginia (R. 9). An important step in the total deactivation process was the draining of all water pipes, boilers, and tanks (R. 9). At the time of deactivation and on periodic occasions thereafter, a special oil preservative was run through the water system to prevent it from rusting, and the pipes, boilers, and tanks were kept completely free of water (R. 9, 86).

In 1951, the MARY AUSTIN was ordered reactivated and placed in active service once again (R. 9). In order to prepare the vessel for seagoing use after years in a laid-up status, surveys of the MARY AUSTIN were conducted both by government employees and employees of contractors specializing in repair, alteration, conversion, or reconditioning of merchant vessels to ascertain the work necessary to put the MARY AUSTIN in service again and to prepare detailed specifications of items requiring repair, reconditioning, or replacement

(R. 9). On February 5, 1951, Atlantic Port Contractors was designated the successful bidder by the Government and awarded the contract to reactivate the MARY AUSTIN according to the detailed specifications included in the contract (R. 9, 121-22).

Under the terms of the contract, Atlantic was required to undertake a complete reactivation and overhaul of the MARY AUSTIN, including major repairs in all parts of the vessel (R. 9, 78, 138). As only one indication of the extent of the rehabilitation work, the vessel was to have all its machinery and parts "opened up" and placed in safe working condition (R. 78-81). With regard to the water system of the ship, drained and empty since the MARY AUSTIN was placed in the "moth ball fleet", detailed specifications instructed the repair contractor that thorough repair and refurbishing of the entire system was necessary (R. 9, 78-81). In these specifications, the contractor was informed that the entire water system had been opened for drainage and that the contractor was expected to clean and repair all water lines and to repair or replace all defective or missing plugs and other parts of the water system, prior to testing out the system and proving it "tight and ready for service" (R. 9, 80-81).

The contract also provided that the vessel was to be delivered to the repair contractor and that Atlantic was to have complete responsibility and control as to the manner and methods of repair (R. 9, 19). The Government reserved only a bare right to inspect the work and materials to insure compliance with contract specifications, but Atlantic alone had control over the manner of performance by its employees and the scheduling and progress of all phases of the reactivation (R. 9-10, 19). In addition, under the express terms

of the contract, Atlantic agreed to provide a safe place to work for its employees and to indemnify the United States for any liability for personal injuries stemming from "the fault, negligence, wrongful acts or omissions" of Atlantic (R. 10).

The MARY AUSTIN, a completely deactivated and dead ship, was towed to Philadelphia, Pennsylvania, and delivered to the repair contractor on November 5, 1951 (R. 10). From that date until the reactivation was completed on December 11, 1951, some five weeks later, the vessel was docked at a pier in Philadelphia where the repairs were made (R. 10). During this time, seven employees of the United States Lines Company,[2] were assigned to the vessel (R. 10). They signed no Shipping Articles during the repair period (R. 10). The District Court found that they had no "control of the ship in the ordinarily accepted context" and that their principal function aboard was to serve as an inspection team for the shipowner to make certain, on the shipowner's behalf and according to the terms of the contract, that Atlantic's work, when completed on any one of the numerous specifications, conformed to specification requirements (R. 10-11). Each of these men was instructed not to interfere with the work or manner of work of Atlantic's employees, and, in fact, no such interference took place (R. 11).

The injuries for which petitioner brought suit resulted from an accident aboard the MARY AUSTIN on the morning of November 21, 1951, while the vessel was undergoing major repairs and reactivation at Atlantic's pier in Philadelphia (R. 11). Petitioner, who

[2] The MARY AUSTIN, while owned by the Government, was husbanded for its account during this period by the United States Lines Company, under a General Agency Agreement (R. 8).

had been assigned to work by Atlantic as a marine engineer (R. 9), was engaged in work on the main engine, and, at the moment of the accident, was working inside the low-pressure cylinder of that engine which was completely stripped down (R. 11, 25). He was injured when struck on the left knee by a small metal plug which was forced out of an overhead water pipe when a fellow employee of the repair contractor (Atlantic), ostensibly engaged with a group of pipefitters in repairing the water system, unexpectedly turned on the water[4] (R. 11, 18-19, 136, 131-132).

The District Court ruled that the United States was not liable either on the ground of breach of a warranty of seaworthiness, or of negligence (R. 8-20). With respect to the former, the District Court, fully cognizant of the standard of liability established in this Court's decisions in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, and *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, concluded that there was no justification for ex-

[4] In its finding of fact number 8, the District Court noted that petitioner had, at the time of the accident, accused a number of his fellow employees of having dropped the plug on him (R. 11). The District Court concluded that the plug had either (1) fallen from one of the pipes or tanks, or (2) been dropped by an Atlantic workman (R. 11). Upon remand to ascertain which of these two possibilities was the probable cause (R. 129-131), the District Court added to finding number 8 that petitioner had established "by a bare preponderance of the evidence" that he was struck by a fallen plug and that this plug fell through the negligence of Atlantic's employees in forcing water through the pipes (R. 131-133, 18-20). The court observed in this connection (R. 18-19):

> That loosely fitted plugs might be present and not able to withstand the application of pressure is certainly not surprising. That very fact was one of the reasons that the ship was being repaired and whatever precautions should have been taken when water was first placed into the lines should have been taken by Atlantic.

tending the *Sieracki* doctrine to cover work performed on a vessel not represented or warranted as seaworthy for a voyage but as completely withdrawn from navigation (R. 17). Nor did the trial court consider the reach of the *Sieracki* warranty of seaworthiness to apply to the situation here of a worker engaged in major reactivation repairs closely approximating "home port structural repairs" (R. 16-18). Moreover, noting that the defective loose plug which caused the injury upon the introduction of water pressure into the pipes by Atlantic's employees was an item generally listed in the specifications as needing testing and repair, the District Court considered it anomalous to imply a warranty of "seaworthiness" to this item and ruled that the MARY AUSTIN was reasonably fit, and hence, "seaworthy", for the intended purpose of reactivation repairs (R. 13, 18-19).

As to negligence, the trial court, observing that the shipowner had the nondelegable duty of using reasonable care to provide petitioner with a safe place to work, held that the United States had fulfilled that duty in the circumstances of this case (R. 18-19). Of crucial significance (in the court's view) on this question was both the fact that defective water system plugs were specifically pointed out for repair and replacement in the contract specifications and the related circumstance that the repair contractor (Atlantic) alone had complete control over the methods of repair utilized by its employees (R. 18-19). Finally, finding no liability on the part of the United States, the court held that it was unnecessary to consider the issue of indemnification presented by the third-party action against the repair contractor (R. 15, 19), but noted in passing that, had the United States been held liable, it would have been

entitled to indemnification from Atlantic[4] (R. 19-20).

On petitioner's appeal to the United States Court of Appeals for the Third Circuit, that court affirmed, holding that the United States was liable neither for breach of a warranty of seaworthiness nor for negligence (R. 135-139).[5] Upholding the District Court on the first of these two issues, Judge Goodrich, speaking for the court, emphasized both the fact that the situation here, unlike *Sieracki* or *Pope & Talbot*, involved a ship which was out of navigation and, in addition, a vessel undergoing, and a worker engaged in making, major repairs. The court considered analogous and persuasive the recent decisions of the Ninth Circuit in *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, certiorari denied, 354 U.S. 938, of the Second Circuit in *Berge* v. *National Bulk Carriers Corp.*, 251 F. 2d 717, certiorari denied, 356 U.S. 958, and of the Fourth Circuit in *Raidy* v. *United States*, 252 F. 2d 117, certiorari denied, 356 U.S. 973. The Court of Appeals also upheld the District Court's findings that the United States had exercised reasonable care in providing a safe place to work and thus was not liable on the alternative allegation of negligence.

[4] Thus the trial court's dismissal of the third-party action was obviously a dismissal without prejudice. In the event that this Court were to reverse the decision exonerating the United States from liability, it would become necessary for the District Court upon remand to reconsider the third-party action, and the mandate from this Court should so direct.

[5] Affirming, *per curiam*, and adopting the opinion of the District Court in 153 F. Supp. 777.

SUMMARY OF ARGUMENT

I

The courts below properly declined to permit recovery by petitioner on the ground of the vessel's alleged breach of warranty of seaworthiness.

A. Fully cognizant of the extension of the warranty of seaworthiness to shore-based workers in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, and subsequent decisions of this Court, the courts below were equally cognizant of the fact that those decisions dealt only with work performed on a vessel in navigation and represented by the shipowner as warranted seaworthy for a voyage. Petitioner's injury aboard the MARY AUSTIN, however, was sustained while he was engaged in major repairs on a vessel which was completely withdrawn from navigation and was being reactivated for seagoing use after years in the Government's "moth ball fleet" of World War II liberty ships. In these circumstances, there are neither historical nor other considerations justifying the extension of the shipowner's burden of absolute liability from vessels warranted ready for sea and for loading and unloading in port to those, like the MARY AUSTIN here, which, as "dead hulks", are not represented or warranted to be seaworthy but are out of navigation undergoing complete renovation for the very purpose of ensuring future seaworthiness.

B. The major extent of repairs on the MARY AUSTIN, moreover, during its five week reactivation at the repair contractor's pier affords a separate if related basis for refusing to find any representation or warranty of seaworthiness. Under this Court's *Sieracki* decision, the warranty of seaworthiness is made

to shore-based workers only if they are doing the work traditionally done by seamen. Judge Learned Hand early noted in *Guerrini* v. *United States*, 167 F. 2d 352 (C.A. 2), certiorari denied, 335 U.S. 843, that home port structural repairs had never been undertaken by the ship's company. And in such recent decisions as *Berghill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938; *Raidy* v. *United States*, 252 F. 2d 117 (C.A. 4), certiorari denied, 356 U.S. 973, and *Beroi* v. *National Bulk Carriers Corp.*, 251 F. 2d 717 (C.A. 2), certiorari denied, 356 U.S. 958, it has been consistently held that the *Sieracki* warranty of seaworthiness does not apply to any part of the general performance of major repairs on a vessel. The District Court below found that the repairs on the MARY AUSTIN were tantamount to "home port structural repairs" (R. 17), and the Third Circuit considered them similar to the major repairs involved in *Berghill*, *Raidy* and *Beroi*, *supra* (R. 138-139). These findings, essentially uncontradicted by petitioner either below or here, preclude application of the *Sieracki* concept of a warranty of seaworthiness; if that is not so, we submit that that doctrine will know no limits and will be as applicable to the construction of a new vessel as to the major reactivation of an old.

C. Even if this Court were of the view that the seaworthiness warranty extends to the MARY AUSTIN despite its status as a vessel warranted out of navigation and undergoing major reactivation repairs, the decisions below are nonetheless correct since there has been no breach of warranty. Petitioner was injured upon being struck by a water line plug while working on the main engine of the vessel when others of the independent contractor's employees negligently turned on

the water in an "opened-up" water system, forcing the loose plug to fall. The United States, however, had left no doubt about the defectiveness of the water system. On the contrary, its condition was known to be one of the reasons the vessel was brought in for repair, and the repair contract most specifically pointed to defective and missing water line plugs, and the necessity for testing out the entire system and repairing and replacing defective plugs before the water system could be ready for service. To conclude that the vessel had warranted the loose plug which struck petitioner as seaworthy would be to ignore the obvious and crucial specifications of the repair contract. The only reasonable conclusion here is either, as the District Court ruled (R. 20), that the water system was warranted reasonably fit only for the intended purpose of repair, and, hence, was "seaworthy" only for that purpose, or, as some courts have viewed it, that it is simply anomalous to include parts of a vessel represented in need of repair in a warranty of seaworthiness. In either view, the plugs of the water system of the MARY AUSTIN, designated for repair, cannot be considered unseaworthy in petitioner's case.

II

The courts below also correctly denied petitioner's claim based on the alleged failure of the United States, as shipowner, to provide him with a safe place to work. The duty of the shipowner to provide a reasonably safe place to work is, of course, measured by negligence standards of ordinary care in the circumstances. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, 618-619; *The Tungus* v. *Skovgaard*, 358 U.S. 588. That the Govern-

ment did not breach its duty to petitioner in this regard is made abundantly clear by the findings of the District Court exonerating the vessel from negligence. Two critical findings are conclusive on this issue. First, as already indicated, the vessel clearly revealed in the repair contract with Atlantic, petitioner's employer, that there were missing and defective water line plugs which must be tested and repaired before the water system could be used. Second, the contract also specified that the repair contractor was to have complete control over the method and scheduling of repairs, and while the vessel could have an inspection team aboard to check completed items, that team had no right to interfere in any way with the repair work. Hence, everything that could have been done by the Government in providing petitioner with a safe place to work was done, and the negligence involved was solely that of the repair contractor's employees in turning on the water. Petitioner's argument on this issue is really grounded on the incorrect premise that the Government is an insurer against any accident whatever on the vessel. The courts, however, have consistently refused to impose such a burden on a vessel. *E.g., Lyon* v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2); *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 734 (C.A. 2), certiorari denied, 359 U.S. 927; *Phipps* v. *N.V. Nederlandsche Amerikaansche S., M.*, 259 F. 2d 113 (C.A. 9).

Finally, and aside from the shipowner's freedom from negligence in this case, it is doubtful in any event that petitioner may take advantage of the safe place to work doctrine "where the prosecution of the work itself makes the place and creates the danger". *Filipek*, *supra*, at 737.

ARGUMENT

I

**The Courts Below Properly Declined to Permit Recovery in This Case on the Ground of Breach of Warranty of Seaworthiness.**

A. *The Warranty of Seaworthiness Does Not, and Should Not, Apply to a Vessel Which Is Not in Navigation.*

1. *This Court's decisions applying the warranty of seaworthiness cover only work on a vessel represented as seaworthy for a voyage.* In its decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, this Court extended the protection afforded by the shipowner's absolute warranty of a seaworthy ship to include longshoremen and other shore-based workmen, employed by independent special contractors, when engaged in work incident to the loading or unloading of the vessel in the course of its voyage. The rationale of this extension beyond shippers, passengers and seamen, who are in privity of contract with the shipowner, is that the shoreworkers, while not in privity with the owner, are equally within the representation of the vessel as seaworthy for the voyage. Moreover, the Court held that loading and unloading, the work involved in *Sieracki*, were part of the voyage and "Historically the work * * * of the ship's service, performed until recent times by members of the crew" (328 U.S. at 96).[6]

[6] This factual premise is sharply disputed in Tetreault, *Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L.Q. 381, 412-418 (1954). A scholarly analysis of the doctrine and its evolution is found in Chief Judge Magruder's recent opinion in *Mitchell v. Trawler Racer, Inc.*, 265 F. 2d 426 (C.A. 1); see also Binlow, *Seaworthiness and Seamen*, 9 Miami L.Q. 418 (1955). Comment, *Overlapping Remedies for Injured Harbor-workers: Interaction on the Waterfront*, 67 Yale L.J. 1205, 1241-1244 (1958).

Hence, the Court concluded that the shipowner could not escape the consequences of his traditional representation of the vessel as seaworthy for the voyage by parcelling out to intermediary employers services incident to its navigation which were traditionally performed by seamen. "For these purposes he [the longshoreman] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards" (328 U.S. at 99).[7]

In subsequent decisions, involving loading or unloading in the course of a voyage, this Court has reaffirmed its *Sieracki* conclusion. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, a shore-based carpenter whose work involved the repair of a "slight defect" in the vessel's loading equipment, and who "was put to work on it so that the loading could go on at once" (*id.* at 413), was held to be entitled to recover on the ground of breach of warranty of seaworthiness. Again, in *Alaska Steamship Co. v. Petterson*, 347 U.S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit[8] granting the protection of the warranty of seaworthiness to a longshoreman injured by a breaking block while engaged in loading the vessel for a voyage. And in *Rogers v. United States Lines*, 347 U.S. 984, the Court held, again *per curiam* and without opinion, that a longshoreman unloading

[7] The Court found further support for its result in "the trend and policy" (328 U.S. at 97) of its prior decisions in which longshoremen loading and unloading vessels were treated as "seamen" and thus conferred rights of recovery under the Jones Act (*International Stevedoring Co. v. Haverty*, 272 U.S. 50); and in which injury to a longshoreman was classified as a marine tort and thus considered within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52.

[8] *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478.

at the voyage end was equally within the warranty. Finally, in two decisions last term, the Court held that the warranty applied in favor of a longshoreman in one case, and a repairman in the other, both of whom were involved either directly in unloading, or, as in *Pope & Talbot*, in repairing machinery to permit loading or unloading to continue. *Cramaty* v. *The Joachim Hendrik Fisser*, 358 U.S. 423; *The Tungus* v. *Skovgaard*, 358 U.S. 588, 595.

Thus, in each of the cases in which this Court has applied the warranty of seaworthiness to non-members of the ship's company, it is plain that the vessel was in navigation on a voyage and was represented by her owner as being seaworthy for that purpose. The work performed by the particular employee in each case was directed to the immediate carrying out of the ship's voyage; in *Sieracki*, *Patterson*, *Rogers*, and *Cramaty*, there was loading or unloading of the vessel in the execution of her voyage, and in *Pope & Talbot* and *Skovgaard*, the performance of work related inextricably to loading or unloading in connection with the voyage. In none of these cases had the vessel been completely withdrawn from navigation for a period of years, as in the instant case, and subsequently been in the process of reactivation for the specific purpose of making it seaworthy for future voyages.[10] On the contrary, the vessels were in active navigation on their voyages; they were held out by their owners as being in all respects

[9] Reversing 205 F. 2d 57 (C.A. 3).

[10] The crew member cases similarly involved only the warranty of the vessel's seaworthiness for a voyage. *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255. Cf. *The Osceola*, 189 U.S. 158, 175, and see Smith, *Liability for Injuries to Seamen*, 19 Harvard L.R. 418, 422-424 (1906).

in a seaworthy condition for their voyages; and this Court recognized that those who were doing the work of seamen and were related to the ship in the same way as seamen "who had been or were about to go on a voyage" (*Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. at 413) were entitled to rely, like crew members, on the owner's implied representation or warranty of the vessel's seaworthiness for their respective voyages.[11]

2. ***There is no justification for extending the Sieracki doctrine to cover work performed on a vessel while it is not represented as seaworthy for a voyage but is out of navigation.*** This Court and other federal courts have consistently recognized the distinction between the legal situation of a seaman working on a vessel in navigation on a voyage, and one who works on a vessel which has been removed from navigation.[12] For example, in *Desper* v. *Starved Rock Ferry Co.*, 342 U.S. 187, relied on by both courts below (R. 17-18, 137-138),

[11] In another illustration of this same point, the Court refused to extend the protection of the warranty to a shore-based repairman fatally injured while cleaning a vessel's generators with carbon tetrachloride. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613. The Government filed a brief as *amicus curiae* in that case, and urged, as here, that recovery for unseaworthiness be denied since the vessel involved was not in navigation and hence not warranted seaworthy for a voyage. The Court denied recovery on the ground that, under *Sieracki*, the shore-based worker was not doing work traditionally done by seamen, and considered it unnecessary to "reach the question" of whether such a warranty was made as to a vessel not in navigation. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, 617.

[12] The fact that the MARY ALICE was in navigable waters while it was undergoing reactivation after years in laid-up status in the "mothball fleet" does not, of course, make it a ship in navigation. *See Bobby* v. *Whitcomb*, 356 U.S. 271. Petitioner's argument that the MARY ALICE was a ship in navigation (Br., pp. 5-9) completely ignores the crucial factor that this issue is ordinarily a question of fact not of law. Both courts below found that the MARY ALICE was a ship out of navigation (R. 17, 137-138).

the Court passed upon the question of whether one doing seasonal repair work on a boat after the end of its navigation continued to be a "seaman" within the meaning of the Jones Act.[13] The decedent, Desper, had been employed during the summer months as an operator or seaman of one of a fleet of motorboats carrying sightseers. This employment had been terminated and thereafter he had helped to lay up the boats for the winter. He was then reemployed in the spring and was injured while helping to paint, clean, and waterproof the boats in preparing them for navigation. At the time of the injury, none of the boats was afloat, nor did they have a captain or crew. The Court concluded that, "while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been 'laid up for the winter.'" *Id.* at 191. See also, *Antus* v. *Interocean S.S. Co.*, 108 F. 2d 185 (C.A. 6); *Hawn* v. *American S.S. Co.*, 107 F. 2d 999 (C.A. 2); *Seneca Washed Gravel Corporation* v. *McManigal*, 65 F. 2d 779 (C.A. 2); *Gonzales* v. *United States Shipping Board*, 3 F. 2d 168 (E.D. N.Y.).

As the courts below perceived, there is no sound distinction between the status of the vessels in the *Starved Rock Ferry Co.* case and the status of the MARY AUSTIN in the instant case. The vessel here had been laid up for years in the "moth ball fleet" of World War II liberty ships, and was undergoing a

[13] It will be remembered, *supra*, fn. 7, p. 11, that the Court, in *Starved*, found support for its conclusion that the longshoreman was there to be regarded as a "seaman", in another Jones Act case, *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50

thoroughgoing reactivation as a necessary prerequisite to any contemplated use in navigation. The warranty or representation was that it was *not* seaworthy for a voyage. The repair work being performed was not an incident of a current voyage as in *Pope & Talbot, Inc. v. Hawn, supra*, 346 U.S. at 413, or *The Tungus v. Skovgaard, supra*, 358 U.S. at 589. The reactivation of the MARY AUSTIN was completely undertaken and under the control of groups of the contractor's employees, and the only representation of the shipowner on board during this period was accorded by employees serving as an inspection team to see if completed repair jobs conformed to contract specifications. In these circumstances, we submit, petitioner was no more a "seaman" to whom a warranty of "seaworthiness" was made than was the worker, Desper, in the *Starved Rock Ferry* case for the purposes of Jones Act recovery.

Although, as we show *infra*, p. 19 *ff.*, the lower court decisions have been primarily concerned with such factors as the type of work and the extent of the repair job, they have also recognized, either in express terms or implicitly, that whether a vessel is out of navigation at the time of injury is an important consideration in determining whether there was any warranty of its seaworthiness. Thus, in *Union Carbide Corp. v. Coull*, 256 F. 2d 449 (C.A. 4), pending on writ of certiorari No. 3, this Term, a repairman was drowned when he fell into the water from a barge which was not in ordinary operation but was moored at his employer's repair yard, and the vessel was claimed to be "unseaworthy" because not equipped with life saving equipment. The court held that the vessel had been "withdrawn from navigation" and "the warranty of seaworthiness does not apply in that situation" *Id.* at

455). Similarly, in *Raidy* v. *United States*, 153 F. Supp. 777 (D. Md.), affirmed, *per curiam*, 252 F. 2d 117 (C.A. 4), certiorari denied, 356 U.S. 973, the courts refused to extend the warranty of seaworthiness to a repair situation similar to that here, in part because the "ship at the time was not subjected to any perils of navigation" and "had necessarily been withdrawn from navigation for a long period" (252 F. 2d at 118). See also, *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, 387 (C.A. 9), certiorari denied, 354 U.S. 938.

In our view, these decisions, like those below, properly interpret this Court's application of the *Sieracki* doctrine to be limited to vessels in navigation, and consequently warranted as fit for a voyage. The MARY AUSTIN held no such status at the time of petitioner's injury, and thus extension of the *Sieracki* rule and standard to this case is unjustified.

### B. *The Warranty of Seaworthiness Does Not, and Should Not, Apply to the Performance of Major Repairs on a Vessel*

As we have noted in Point I, A, *supra*, pp. 13-16, each of the pertinent decisions of this Court, from *Sieracki* to *Cromady*, has applied the seaworthiness warranty to loading or unloading of vessels in navigation, or to minor repairs inextricably related to such loading or unloading. It has never been suggested in any of these decisions, or those of the lower federal courts interpreting the *Sieracki* doctrine, that the warranty applies in the situation of major repairs to a vessel, either in dry-dock or, as here, berthed at the repair contractor's pier, where the vessel is in fact represented not to be seaworthy for a voyage. On the contrary, the decision of the Third Circuit below, holding that the major re-

activation of the MARY AUSTIN was not work covered by a warranty of seaworthiness, accords with and was expressly predicated on consistent holdings in other courts of appeals subsequent to this Court's decision in *Sieracki*. Thus, completely aside from the question of whether the warranty applies to a vessel withdrawn from navigation discussed *supra*, the major reactivation of the ship, tantamount in the District Court's view to "home port structural repairs" (R. 17), affords a separate and independent basis for affirming the decision below.[13]

In the first of these lower court decisions subsequent to *Sieracki*, the Ninth Circuit had occasion to consider whether the warranty applied to a worker engaged, like petitioner here, in repairing machinery aboard a vessel on which major or "general" repairs were being performed. *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385, 387, certiorari denied, 354 U.S. 938.[14] While

[13] It is true that, as with many of the variant factors applied by the courts in applying the *Sieracki* standard to ever-varying factual patterns, consideration of the factors of "in or out of navigation" and of "extent of repairs" tend to coalesce. *See, e.g., Berryhill* v. *Pacific Far East Line*, *supra*, 238 F. 2d at 387; *Reed* v. *United States*, *supra*, 252 F. 2d at 118. Thus, a vessel, like the MARY AUSTIN, on which major repairs are being performed, is customarily dry-docked or berthed at the contractor's pier; in any event, it is out of navigation. However, it is our position that, regardless of the extent of repairs, a vessel "out of navigation" is not warranted seaworthy to longshoremen.

[14] Unlike the MARY AUSTIN here, the vessel in *Berryhill* was dry-docked for repairs. Contrary to petitioner's assertion (Br. 20-21), however, it is the extent of repairs that has been deemed significant, not whether the repairs happen to be accomplished in drydock, or at the repair contractor's pier. *See, e.g., Reed* v. *National Bulk Carriers, Inc.*, 118 F. Supp. 608, 609 (S.D. N.Y.), 251 F. 2d 717 (C.A. 2), certiorari denied, 356 U.S. 958, *rehearing denied*, 22; *Lamb* v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), 265 F. 2d 219 (C.A. 2), certiorari denied, 23; *Ryan* v. *United States*, 167 F. Supp. 929 (S.D. N.Y.), *contra*, p. 23.

repairing the propulsion machinery, a grinding wheel furnished claimant by his employer (the repair contractor) disintegrated causing his injury. In rejecting the argument that the *Sieracki* rule was applicable, the Court of Appeals observed that "[n]ot all repairs are 'ship's work', to be performed, historically or currently, by the crew"; it emphasized that "the repairs had nothing to do with loading or unloading the ship" and were "nothing of an improvised, hurried nature, done to save the 'ship work' time, but were of sufficient importance to cause the ship to be drydocked" (238 F. 2d at 387).

Subsequently in *Raidy* v. *United States*, 252 F. 2d 117, affirming, *per curiam*, *Raidy* v. *United States*, 153 F. Supp. 777 (D. Md.), certiorari denied, 356 U.S. 973, the Fourth Circuit refused to extend the *Sieracki* rule in the context of major repairs to and conversion of a government vessel. The facts in *Raidy* are analogous to those here. The government vessel was brought in for major repairs, the manner and scheduling of which were completely under the control of the repair contractor, with the Government retaining the mere right to inspect completed items to insure compliance with specifications (153 F. Supp. at 778). The workman was hurt while making a chalkline measurement to align a piece of machinery, when he fell through a hole in a metal walkway caused by the removal of a plate in that walkway by other employees of the contractor (153 F. Supp. at 778). The District Court, whose opinion was adopted by the Fourth Circuit upon affirmance (252 F. 2d at 118), stressed that the major repairs on the vessel "were not the type of services historically and traditionally rendered to the ship by members of the crew but to the contrary required the facilities and skilled personnel of

a modern well equipped shipyard" (153 F. Supp. at 779). See, also, *Union Carbide Corp.* v. *Goatt*, *supra*, 256 F. 2d at 455.[16]

The third recent decision of a Court of Appeals relied on below was that of the Second Circuit in *Berga* v. *National Bulk Carriers Corp.*, 251 F. 2d 717, certiorari denied, 356 U.S. 958. Plaintiff in *Berga* was a rigger injured while pulling a hoist to raise a new bulkhead into position. Pointing to the major repairs undertaken on the vessel by plaintiff's employer (the repair contractor) while the vessel was docked, as here, at the contractor's pier,[17] the Second Circuit (per Judge Hand) declined to permit recovery on the ground of breach of warranty of seaworthiness. The court observed with regard to the *Sieracki* standard that "there must be some limit, else the whole fabrication of a new ship would be included" (251 F. 2d at 718).[18]

In subsequent decisions, the exclusion of the major repair situation from the ambit of the *Sieracki* ruling

[16] Petitioner's assertion of a conflict between the decision below and the views of the Fourth Circuit, supposedly reflected by petitioner's only decision in *United States* v. *Lindgren*, 28 F. 2d 725, affirmed, 281 U.S. 38 (Pet. pp. 11-15), is thus rebutted by those recent decisions in *Gioiello* and *Goatt*, squarely in accord with the decision of the Third Circuit here. Moreover, in *Lindgren*, a pre-*Sieracki* decision, there was no discussion of the exact nature and extent of the repairs undertaken.

[17] See the decision in the District Court, 148 F. Supp. 608, 609 (S.D. N.Y.).

[18] See Judge Hand's earlier opinion in *Guerrero* v. *United States*, 167 F. 2d 352 (C.A. 2), certiorari denied, 335 U.S. 843, where he said:

> "* * * probably all that major structural repairs were, at least normally, to be done elsewhere than in the home port, often not even by the crew; * * *." [167 F. 2d at 354]

The District Court noted with regard to the extent of repairs in the instant case that it constituted "about as close an approximation to home port structural repairs as analogy will allow" (R. 17).

has been reiterated. In *Lyon* v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2), plaintiff was a ship fitter employed by a repair contractor in the performance of major repairs on a government vessel docked at a pier in Brooklyn. He was injured in a fall while using a crowbar as a fulcrum to set the base of a lifeboat winch. The District Court ruled, in a decision upheld by the Second Circuit, that in the context of the major repairs undertaken on the vessel no implied warranty of seaworthiness existed (163 F. Supp. at 207). And in *Amato* v. *United States*, 167 F. Supp. 929 (S.D. N.Y.), the District Court held, in a repair situation analogous to that here, that the *Sieracki* standard did not apply to any part of the general performance of major repairs on a vessel (167 F. Supp. at 935-936).

Petitioner, unable to distinguish these recent decisions relied on by the court below, looks for support either to cases of pre-*Sieracki* vintage [19] or to instances where the repairs were not commensurate with those here. Thus, *Ronosich* v. *Union Dry Dock & Repair Co.*, 67 F. 2d 377 (C.A. 3), a pre-*Sieracki* decision which found no unseaworthiness, gave no indication that major repairs were involved at the time of claimant's injury. The same is true of *Read* v. *United States*, 201 F. 2d 758, another Third Circuit decision, expressly distinguished by the court below in this case "on the amount of work involved" (R. 138-139). And *Crawford* v. *Pope & Talbot, Inc.*, 206 F. 2d 784, also a Third Circuit decision, did not involve major repairs at all but merely tank-cleaning undertaken by shore-based workers and seamen of the vessel working

[19] See fn. 16, *supra*, p. 22.

together while the vessel was preparing to finish loading her cargo.

Moreover, it is not significant under *Sieracki* to determine whether petitioner's work as a marine engineer at the time of the accident, viewed without the perspective of major repairs, was or was not the work traditionally done by seamen. The question here is whether the operation as a whole constituted major repairs to the vessel; if this question is answered affirmatively, then the warranty of seaworthiness is not made to those aboard, regardless of the type of task each of those many repairmen may perform. This is so since major repairs to a vessel equivalent to "home port structural repairs" was not a task ever undertaken by the crew." *E.g., Guerrini* v. *United States*, 167 F. 2d 352 (C.A. 2), *supra*, fn. 18.

In each of the recent Court of Appeals decisions denying recovery for breach of warranty of seaworthiness in cases involving repairs of an extensive nature, the *Sieracki* standard has been properly focused on the totality of the repair job, rather than on the type of work the individual happened to be performing at the moment of his injury. It is clear that, had the inquiry been directed at the latter consideration, the Ninth Circuit in *Berryhill*, *supra*, could just as easily have found that shorebased worker, repairing machinery, to have been doing the work traditionally done by seamen; the same conclusion by the Fourth Circuit was possible in *Baidy*, *supra*, where the workman was merely making a chalkline measurement at the moment of injury; by the Second Circuit in *Bora*, *supra*, where the workman was pulling a hoist to raise a bulkhead into position; and by the district courts in *Lyon* and *Amato*, *supra*, where the workmen were using a crowbar as a

fulcrum on a lifeboat winch, and in the other case simply painting.

In addition, as recognized by the courts, individual job analysis of teams of shorebased workers performing major repairs on a vessel would lead to completely fortuitous results in recoveries for breach of warranty of seaworthiness. If two or more men, working in close proximity aboard a vessel, were injured in the same accident, protection under a warranty of seaworthiness would depend on the complete fortuity of the individual worker's trade or craft, or, even more fortuitously, on the task he was involved in at the exact moment of the accident.[20] See especially, *Amato* v. *United States*, 167 F. Supp. 929, 935-936 (S.D.N.Y.). Such resulting inequality among workers in the same work force engaged in the major repairs aboard a vessel would clearly be carrying the *Sieracki* standard to an extreme.[21] *Amato* v. *United States*, *supra*.

Finally, it is evident (and petitioner does not seriously attempt to demonstrate otherwise) that the work performed on the MARY AUSTIN constituted major repairs.[22] For years subsequent to its retirement after

[20] Under *Sieracki* and subsequent decisions of this Court, it is not the workman's task, but the repair operation involved, "not the 'label of trade or skill'" but the job performed at the time of injury, that is critical to the determination of recovery on the ground of breach of warranty of seaworthiness. *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, 617.

[21] Cf. *Pope & Talbot* v. *Hewn*, 346 U.S. 406, where in an incidental repair situation involving only one workman, emphasis was placed on "equal treatment to those exposed to the same dangers, and the warranty was held applicable. 346 U.S. at 413.

[22] As we have indicated, the District Court found that the reactivation of the MARY AUSTIN constituted "about as close an approximation to home port structural repairs as analogy will allow" (R. 17a, see n. 18, *supra*. On appeal to the Third Circuit, petitioner did not contest this finding, and that court concluded that the extent of repairs in this case was similar to that involved in

World War II, the vessel had been deactivated and laid up as a "dead hulk" in the "moth ball fleet" at Norfolk, Virginia (R. 9). When reactivation for active service was ordered in 1951 in connection with the Korean hostilities (R. 136), it became necessary to survey the entire ship and prepare detailed specifications of reconditioning, repair, and replacement (R. 9). These specifications covered not only a complete reactivation of the entire water system (R. 9) but of the entire ship (R. 9, 17, 78), and the reactivation process required the presence of the vessel at the repair contractor's pier for some five weeks. During this time, the repair contractor and its teams of repairmen were involved, in compliance with the hundreds of specifications in the contract, in repairing and making fit *all* the machinery and *all* other parts of the vessel not simply, as petitioner emphasizes (Br., pp. 18, 20, 21), the water lines of the vessel (R. 9, 17, 78).

In these circumstances, the finding of the District Court and the Court of Appeals that the major repairs in this case were similar to those involved in *Berryhill*, *supra*, *Baldy*, *supra*, and *Berge*, *supra*, and constituted "as close an approximation to home port structural repairs as analogy will allow" (R. 17) cannot be disputed. And it is equally clear that unless the *Sieracki* doctrine was intended to apply to shorebased workers in any repair situation whatever, as petitioner here necessarily contends (Br., p. 18), then that doctrine is inapplicable to the reactivation of the MARY AUSTIN and petitioner's work in that reactivation.

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*Berryhill*, *Baldy* and *Berge*, *supra*. Apparently appreciating the force of this finding here, petitioner, unable to show that the repairs on the MARY AUSTIN were minor in nature, improperly focuses on the repairs to the vessel's water lines, a small part of the total reactivation job.

### C. *Even If the Warranty of Seaworthiness Doctrine Applies to a Vessel Out of Navigation and On Which Major Repairs Are Being Performed, the Vessel Here Was Reasonably Fit for the Purpose Intended and Thus Was "Seaworthy"*

Even if this Court were to hold that the seaworthiness warranty extends to the MARY AUSTIN despite the facts (1) that it was a vessel out of navigation at the time of the accident and (2) that it was undergoing major repairs, the decision below denying recovery for breach of warranty of seaworthiness is still correct since there was no breach of warranty in this case.[23] As well recognized in numerous decisions by this Court and the lower federal courts, the warranty of seaworthiness, although it imposes an absolute duty on the shipowner, is not a warranty that the ship or gear or equipment is absolutely safe in all events, but only reasonably so, depending on the particular facts and circumstances. *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U.S. 336, 339; *Pope & Talbot, Inc.* v. *Cordray*, 258 F. 2d 214, 218 (C.A. 9); *Brown* v. *Bravo Corp.*, 258 F. 2d 704, 706 (C.A. 3); *Ross* v. *Steamship Zeeland*, 240 F. 2d 820, 822 (C.A. 4); *Berti* v. *Compagnie*

[23] The District Court not only ruled that the warranty did not apply in the situation of a vessel out of navigation and undergoing major repairs but also held that, in any event, "The condition of the S. S. MARY AUSTIN when delivered by the United States of America to Atlantic for reactivation purposes only did not constitute the S. S. MARY AUSTIN an unseaworthy vessel" (R. 20). The Court of Appeals, holding that no warranty applied, did not reach the question of whether the vessel was, or was not, unseaworthy (R. 135-139). Similarly, if this Court agrees with the Court of Appeals that the warranty does not apply to a vessel out of navigation and undergoing major repairs, it would not be necessary to consider the issue posed under this Point I, C, namely, whether the vessel and its gear were, in fact, reasonably "seaworthy" for their intended use.

*De Navigation Cyprien Fabre*, 213 F. 2d 397, 400 (C.A. 2); *Nunes* v. *Farrell Lines*, 227 F. 2d 619, 622 (C.A. 1).[20] And the warranty not only limits the ship owners' obligation to provide gear or equipment to that which is simply reasonably safe, but also equipment which is reasonably adequate and safe for the use which the owner can expect will be made of the equipment. *Pope & Talbot, Inc.* v. *Cordray*, 258 F. 2d 214, 218 (C.A. 9); *Nunes* v. *Farrell Lines*, 227 F. 2d 619, 622 (C.A. 1).

The "equipment" involved here was the loose plug in the water system which fell and struck petitioner when others of the contractor's employees unexpectedly turned on the water in the "opened up" water system (R. 18-19). The United States, however, had left no doubt that it did not warrant the adequacy of the entire water system. In detailed specifications, the Government had informed the contractor of the exact nature of this system, that it had been "opened up" and required testing, repairing, and reconnection, and, most specifically, that the contractor should repair or replace any defective or missing plugs in the water lines (R. 9, 79-80). The fact that the water system was in this "opened up", unconnected, and inadequate condition was one of the very reasons the vessel was brought in for reactivation and repairs, and consequently, as the District Court concluded, it should not have been surprising to the contractor's employees that

[20] See also, *Reynolds* v. *Royal Mail Lines*, 254 F. 2d 55, 56 (C.A. 9); *Mesia* v. *Kea Steamship Corp.*, 260 F. 2d 747, 750-751 (C.A. 3); *Poppert* v. *United States*, 225 F. 2d 595, 598 (C.A. 2); *Manhat* v. *United States*, 220 F. 2d 143 (C.A. 2), certiorari denied, 349 U.S. 966; *Lyon* v. *United States*, 163 F. Supp. 206, 208 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2); *Preston* v. *Mississippi Shipping Co.*, 156 F. Supp. 652, 656 (E.D. La.)

a loose plug might fall out upon the application of water pressure (R. 18-19).

To conclude that the shipowner had warranted this water system or its component parts, including the line plugs, to be seaworthy, or adequate and safe for any purpose, and that it had breached this warranty, would be to ignore the contract specifications and the very reason for the employ of such men as petitioner aboard the MARY AUSTIN. While a water system's intended and reasonably anticipated purpose is normally the distribution of water through its parts, that purpose was hardly normal or contemplated under the specifications prepared by the Government. The only intended and anticipated purpose of the system in these circumstances was its complete repair, and by the express terms of its contract of repair the Government had every reason to expect that the contractor's employees would use the system with that purpose in mind. The manner and method of accomplishing the required testing and repair were left completely to the contractor, and the Government had no right to interfere with the way the work was done.

Given these facts, we submit that either of two conclusions is possible with regard to a warranty of seaworthiness here. On the one hand, it might be held that the shipowner's warranty was only that the water system was reasonably fit for repair, not for water distribution, and that there was no breach of this limited warranty. Alternatively, to view it as some courts have, while there may be a warranty applicable generally to vessels brought in for repair, it would be anomalous to include parts designated for repair in that warranty; thus, the water system of

the MARY AUSTIN, specifically designated for repair, cannot be considered in terms of an implied representation of its "seaworthiness".

None of the decisions of this Court, applying the warranty of seaworthiness under the *Sieracki* doctrine, furnishes the slightest basis for concluding otherwise. In *Sieracki*, *Petterson*, *Rogers*, and *Cramaty*, *supra*, the workman was injured because of a defect in the equipment intended, and impliedly warranted safe, for use in loading the vessel for the voyage then in progress; while in *Pope & Talbot* and *Skovgaard*, *supra*, the injuries were sustained because of unsafe conditions on decks which the repairmen had to use to accomplish minor repairs on loading equipment.[25] In each, the vessel or gear was indisputably unsafe for the intended purposes of the particular jobs involved; in none was there a contract, as here, specifying that the equipment was unsafe for normal use, and that it must be repaired by the workmen before it was "tight and ready for service" (R. 9, 80-81).

The lower federal courts have refused to extend and distort the concept of the warranty of seaworthiness by applying it to the very conditions which, as in this case, cause the shipowner to bring his vessel in for repair, and which the shipowner specifically designates for repair. Thus, in an early decision, the Second Circuit held the shipowner free of liability where a repairman fell through a hatch cover on a vessel which was brought in for repair, *inter alia*, of 50% of its hatch covers. *Byars* v. *Moore*-

[25] In *Pope & Talbot*, the workman fell through an "uncovered hatchway hole" aboard the vessel, 346 U.S. at 407. In *Skovgaard*, he slipped on a deck area from which oil had not been removed and fell to his death. 358 U.S. at 589.

*McCormack Lines*, 155 F. 2d 587. The court absolved the vessel on two principal considerations: (1) "because the independent contractor had been warned of the defective condition of the hatches and had been given possession of the ship in order to repair them", and (2) because the shipowner could not be held to a duty of warning each individual employee of the defective covers since he could not know which of the contractor's employees would be doing what jobs. 155 F. 2d at 588.

Recent appellate rulings have similarly denied recovery for breach of warranty of seaworthiness in situations analogous to that here. The Second Circuit has readopted its view in *Byars*. In *McDaniel* v. *The M S Lisholt*, 257 F. 2d 538, certiorari granted, judgment vacated and case remanded for new trial, 359 U.S. 26, a fireman came aboard a vessel as a fire watcher after a small blaze had broken out and been temporarily controlled. He sued for injuries sustained from a subsequent flash explosion aboard. Denying recovery for breach of warranty of seaworthiness, the court stated (257 F. 2d at 540):

> * * * it is undisputed that the vessel was unseaworthy at the time libelant went aboard. He was stationed aboard the ship because of the vessel's unseaworthiness occasioned by the fire. There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness.[28]

[28] See also, *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 731 (C.A. 2), certiorari denied, 359 U.S. 927. The *McDaniel* judgment was vacated by this Court and the case remanded for a new trial on the issue of negligence under the standard enunciated in *Kermarec* v. *Compagnie Generale*, 358 U.S. 625, *infra*, pp. 35-36.

The Third Circuit has denied recovery for breach of warranty of seaworthiness to repairmen on board a vessel to repair defective conditions, one of which causes the injury. *Brzozowski* v. *Isthmian S. S. Co.*, 163 F. 2d 720, 722; cf: *Mosle* v. *Koa Steamship Corp.*, 260 F. 2d 747, 752. And the Ninth Circuit has denied recovery for breach of warranty of seaworthiness where, as here, a vessel's equipment was adequate for its intended purpose but was not used in accordance with that purpose by the contractor's employees, thus causing the injury. *Reynolds* v. *Royal Mail Lines*, 254 F. 2d 55, 56-57.

In a situation almost identical to that in the present case, the Fourth Circuit has noted the anomaly of speaking of an item specified for repair in terms of a "warranty of seaworthiness". In *Raidy* v. *United States*, 252 F. 2d 117, affirming, *per curiam*, *Raidy* v. *United States*, 153 F. Supp. 777, certiorari denied, 356 U.S. 973, *supra*, pp. 21-22, the court denied recovery for breach of warranty of seaworthiness to a shore-based worker injured when he fell through a hole in a metal walkway caused by the removal of a defective plate in that walkway by other employees of the contractor. In a cogent analysis, equally applicable to the defective plugs here, the court ruled that "[i]t seems * * * a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship'. The removal of the absent plate, for the substitution of others, was a part of the work required to be performed by the contract specifications" (252 F. 2d at 118). See also, *Pinion* v. *Mississippi Shipping Co.*, 156 F. Supp. 652, 656 (E.D. La.); *Lyon* v. *United States*, 163 F. Supp. 206, 208 (E.D. N.Y.), affirmed, 265 F. 2d 219 (C.A. 2).

And if it is not a "misnomer" to speak of a warranty of seaworthiness applying to any part of a vessel des-

ignated and brought in for repair, like the defective plug causing petitioner's injury, then the only possible application of the warranty is with regard to the equipment's fitness for its intended purpose. As we have seen, *supra*, pp. 28-29, that purpose in this case was solely one of repair, and for that purpose the water system of the MARY AUSTIN was reasonably safe.

## II

### The Courts Below Properly Denied Recovery on the Ground of Negligence

#### A. *The Courts Below Correctly Found that the Government Had Not Failed to Provide Petitioner with a Reasonably Safe Place to Work*

Petitioner attempts to fashion another source of absolute liability by contending that his alternative allegation involving failure to provide a safe place to work is also a branch of "unseaworthiness" not related in any way to negligence standards of due care (Pet., pp. 17-21, Br., pp. 21-24). This contention, however, is gainsaid by many decisions of this Court and the lower courts which clearly establish that the duty of a vessel to provide a safe place to work is measured solely by the negligence standard of ordinary care in the circumstances. Moreover, while, as we show below in Point II, B, the Court of Appeals correctly held that there was no violation of this duty here even if it be considered "nondelegable," as petitioner maintains, in our view this Court's decisions likewise establish that the duty of due care involves the actions of the vessel alone and does not in any way imply responsibility for negligence on the part of the contractor in failing to provide his employees with a safe place to work. And, as found by the District Court—after detailed treatment of the contract of reactivation, the complete con-

trol of the contractor over the method and manner of repair, the accident itself, and the condition of the vessel—there was no violation of *its* duty by the Government of failing to exercise due care in providing petitioner with a reasonably safe place to work.

Only last term, the Court, in several decisions, considered the scope of the vessel's duty to provide a safe place to work, to shorebased personnel aboard for repair or reconditioning purposes. In *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, the vessel was turned over to a contractor for a periodic overhaul. Part of the job entailed cleaning the ship's generators with carbon tetrachloride, and this was undertaken by a subcontractor which employed the deceased workman. The Court disposed of the action stemming from the workman's death from carbon tetrachloride poisoning, and grounded on the usual combined allegations of breach of warranty of seaworthiness and negligence, by remanding for a finding on negligence alone[27]; the Court expressly noted that, as to this issue, "the defendants owed a duty of exercising reasonable care for the safety of the decedent" (*id.* at 618-619). Moreover, as the basis for its remand on this question, the Court stressed the fact that the vessel, aware of the ventilation system in the engine room where the cleaning was done, also had actual knowledge of (indeed, had required under its contract of overhaul) the use of carbon tetrachloride in the cleaning (*id.* at 615, 619). By implication, the holding in *Halecki* was that, if the vessel had no such knowledge and personal responsibility for the method of work, and the question

[27] Recovery on the ground of breach of warranty of seaworthiness was denied.

of negligence solely involved the subcontractor, the vessel would not be liable (in the subcontractor's stead) for failing to provide a safe place to work. This holding completely negates petitioner's two-fold argument: (1) that providing a safe place to work is an absolute duty imposed under standards of seaworthiness rather than negligence, and (2) that, in any event, the failure of the contractor to provide a safe place to work, even though the vessel is in no way actually culpable, is sufficient to impose liability on the vessel on this same ground.

The holding in *Halecki* on the question of providing a safe place to work is reiterated in last term's decisions in *The Tungus* v. *Skovgaard*, 358 U.S. 588, and *Kermarec* v. *Compagnie Generale*, 358 U.S. 625. In the former, an independent contractor's employee went aboard a vessel to repair a pump in use in unloading an oil cargo. He slipped on some oil which had spilled over onto the deck and fell to his death. The conclusion that the case presented a question of fact as to whether the vessel had provided the decedent with a reasonably safe place to work was specifically predicated on the finding that "the officers and crew of the [vessel] remained in over-all control of the vessel, and * * * were well aware of the existence of the oil spill and of the danger created by it for approximately an hour before [decedent] arrived on board" (*Skovgaard*, *supra*, at 594). Once again the Court emphasized the need for personal responsibility and actual culpability on the part of the vessel and thereby refuted the present petitioner's contention that the negligence of the independent contractor, in and of itself, creates liability on the vessel's part for failing to provide a safe place to work. Finally, in *Kermarec*, *supra*, the

Court's position was put in these terms (358 U.S. at 632):

> We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case. * * *

That the United States as shipowner did not fail to provide petitioner with a reasonably safe place to work aboard the MARY AUSTIN seems obvious even from a cursory examination of the findings of the District Court. The sole defect underlying petitioner's claim of working in an unsafe place is the loose waterline plug which dropped and injured him upon the unexpected introduction of water pressure into the pipes by the contractor's employees. Completely contradicting petitioner's argument that the loose plug constituted a latent defect (Br., pp. 24-27), the record clearly reveals, and the District Court found (R. 9), that the ship had specifically pointed to loose and defective water line plugs in the contract of repair. See *supra*, pp. 4, 28-29. Petitioner's argument that the loose plug causing the accident was a "latent" defect necessarily implies the absurd conclusion that the vessel had the duty of personally warning each of the repair contractor's employees of each of the multifold defects specified for repair in the repair contract.

Aside from the unmeritorious "latent defect" claim, there is no suggestion that the Government had anything to do with the accident, or that under its contract with petitioner's employer it could have interfered in any way with the manner of repairs and reconditioning utilized by the contractor's employees. No such claim

could be made, of course, since, as the District Court found, (1) all testing in the reconditioning of the "opened-up water system was to be handled by the contractor (R. 9), and (2) the contractor had complete control over the reactivation work since the shipowner's employees aboard the vessel were merely inspectors authorized to check completed items for conformity with contract specifications, but not authorized to interfere, and not actually interfering in any way with the manner or means of work of the contractor's employees (R. 9-11, 18-19).

In the light of these circumstances, it is difficult to see what the United States could have done, other than what it had done, to avoid this accident. It did not conceal, as petitioner now claims, the defect of loose or missing plugs in the water lines for it was these defects, *inter alia*, that were specifically designated for repair. In fact, as we show below in Point II, B, it is extremely doubtful that this type of defect in the water system of a vessel could afford the basis for any complaint of failure to provide a safe place to work. Furthermore, even if the government inspectors aboard were cognizant of petitioner's fellow-employees turning on the water, which is not established by the record or found by the District Court, they had no right to interfere with the performance of work aboard the MARY AUSTIN.

This Court does not have to search far for persuasive authority in the lower courts consistently holding that, in identical or analogous circumstances, there is no breach by the shipowner of its obligation of due care, and that the actions of the independent contractor do not redound to the liability of the shipowner. A recent Second Circuit decision is squarely in point. In *Lyon*

v. *United States*, 163 F. Supp. 206 (E.D. N.Y.), affirmed, 265 F. 2d 219, *supra*, p. 23, a government vessel was brought in to a repair contractor for major repairs. The contractor's employee was injured, when, in using a crowbar as a fulcrum to set the base of a lifeboat winch, he fell from a part of the vessel where a handrail had been removed in the process of repairs. Rejecting the contention that the vessel had any liability in negligence by dint of the contractor's failure to provide a temporary barrier or railing, the District Court emphasized that the manner of performance of repairs was completely within the contractor's control, under contract provisions identical with those here, merely allowing an inspection team aboard on behalf of the shipowner (163 F. Supp. at 208-210). The Second Circuit agreed, *per curiam*, ruling succinctly that "[I]n the absence of power to supervise or control the work, the shipowner cannot be held negligent" (265 F. 2d at 220).

This ruling accords with the consistent view adopted in earlier holdings in the Second Circuit and in the other courts of appeals. In *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 731 (C.A. 2), certiorari denied, 359 U.S. 927, the shorebased workman was injured when a king post snapped while he was testing it for stress and strain. On the question of the vessel's liability in negligence for failing to see that the workman had a reasonably safe place to work, the court exonerated the vessel, indicating that while certain of the vessel's officers were aboard they had no control over the work performance (258 F. 2d at 737). See also, *Berti* v. *Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397, 401 (C.A. 2). And in *Amato* v. *United States*, 167 F. Supp. 929 (S.D. N.Y.), *supra*, p. 23, the court ob-

served, in circumstances essentially similar to those here, that (167 F. Supp. at 934):

> * * * the owner could scarcely be expected to anticipate or prevent every hazard which arose in the course of the work. To impose such a requirement would make him, for all practical purposes, an insurer against the negligence of the contractor, and the owner's duty certainly does not yet go that far.

A clear exposition of the established principle that the vessel's so-called "non-delegable" duty of using due care to provide a safe place to work is not, in fact, non-delegable where complete control of the work has been assumed by the contractor, and the area of work surrendered to him with no unknown hazards, is provided by the Third Circuit's decision in *Brabazon* v. *Bolships Co.*, 292 F. 2d 904, 906-907. See also, *Osnovik* v. *United States*, 204 F. 2d 654, 655 (C.A. 3); *Mesle* v. *Koa Steamship Corporation*, 260 F. 2d 747, 750 (C.A. 3). The Fourth Circuit, in *Raidy* v. *United States*, 252 F. 2d 117, *supra*, adopted the district court's view that any negligence on the part of the contractor's employees in removing the walkway plate through which the injured workman fell did not make the vessel liable for having failed to provide a safe place to work. See also, *Blankenship* v. *Ellerman's Wilson Line New York, Inc.*, 265 F. 2d 455, 457-458 (C.A. 4).[28] And,

[28] *Blankenship* also refutes any suggestion that the negligence of the independent contractor's employees, in and of itself, makes the vessel unseaworthy. See also, *Cramaela* v. *The Joachim Hendrik Fisser*, 358 U.S. 423; *Titus* v. *The Santorino*, 258 F. 2d 352 (C.A. 9); *Procida Co. Navega S.A.* v. *Mandalis*, 262 F. 2d 284 (C.A. 4); *Pluss* v. *N.V. Nederlandsche Amerikaansche S.M.*, 259 F. 2d 143, 145 (C.A. 9); *Eccles* v. *Pacific-Atlantic Steamship Co.*, 218 F. 2d 562 (C.A. 9).

finally, the Ninth Circuit in a recent decision has observed that, whether the question of the owner's duty to provide a safe place to work for the independent contractor's employees be framed in terms of negligence or unseaworthiness, "the shipowner has no burden of an insurer and is not required to provide an accident proof ship": moreover, the owner is not to be held for the negligence of the independent contractor. *Phipps* v. *N. V. Nederlandsche Amerikaansche S., M.*, 259 F. 2d 143, 145 (C.A. 9).

Nor do any of the decisions relied on by petitioner bear out his contention that the vessel's duty to provide a safe place to work—where complete control of that work has been surrendered to the contractor—makes the vessel liable for an injury to a repairman incurred solely as a result of the negligence of the contractor's employees in the repair process. None of them even involves this situation. Thus, petitioner's heavy reliance on *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, is misplaced. In *Crumady*, this Court held that a vessel was liable on the ground of breach of a warranty of seaworthiness where the vessel had furnished a defective winch to a stevedoring company impliedly warranting it to be safe, where the vessel did not reveal the nature of the defect, and where the defective winch in conjunction with the additional negligence of the stevedoring company's employees in using it caused the accident. Here, of course, unlike the situation in *Crumady*, the defective plug was not warranted to be safe but was designated for repair as part of the reactivation of the MARY AUSTIN'S water system. Thus, as the court below concluded, the sole act of culpability involved was that of the contractor's em-

ployees in turning on the water without testing and "proving out" the water lines.

As to *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, this Court was there concerned solely with a vessel's unseaworthiness in its failure to supply its crew with sound rigging, a failure unaffected by the subsequent negligence of a ship's officer in using the rigging. *Dixon* v. *United States*, 219 F. 2d 10 (C.A. 2), merely involved the seaworthiness of a vessel's ladder after repair and during a voyage. Similarly, the decisions in *Poignant* v. *United States*, 225 F. 2d 595 (C.A. 2) (seaworthiness of vessel without garbage chutes, where apple peel on floor was the cause of injury); *Pacific Far East Lines* v. *Williams* 234 F. 2d 378 (C.A. 9) (seaworthiness and due care of vessel failing to provide longshoremen with adequate lighting); and *The Steandbee*, 102 F. 2d 577 (C.A. 6) (seaworthiness of vessel's safety appurtenances around dangerous oil pump) have no bearing whatever on the factual setting of the accident here, and in no way militate against the result reached below.

**B.** ***The Safe Place to Work Doctrine Is Not Applicable***

As we have just shown in Point II, A, *supra*, whether or not petitioner had a safe place to work at the moment he sustained his injury aboard the MARY AUSTIN does not concern the United States as shipowner since it turned over the vessel to the contractor with complete notice of the defective water system and water line plugs which were to be repaired, and with no control over the work performance of the contractor's employees in testing and repairing the water system. The facts supporting notice of the defect and lack of control in the work were basically undisputed and, in any

event, were properly upheld by the Third Circuit on appeal as not being clearly erroneous. *McAllister* v. *United States*, 348 U.S. 19. In our view then, regardless of the applicability of the "safe place to work" doctrine to the facts of this case, the Government, under firmly established principles, is absolved from liability on this ground by having exercised due care to the extent of its responsibility.

As an additional basis for denying petitioner recovery in negligence, we suggest that it is extremely doubtful, as the Court of Appeals observed (R. 137), that he may take advantage of the "safe place to work" doctrine in the circumstances of this case. There were no hidden hazards affecting petitioner's work, no lack of basic safety equipment, no lack of proper supervision on the contractor's part, at least as established by the record; in other words, there was nothing other than the dangers involved in the testing and repairs of major proportion that were undertaken on the MARY AUSTIN. If this is enough to create an unsafe place to work, then every such vessel undergoing major repair is inherently and necessarily an unsafe place to work, and every injured employee is entitled to recover without consideration of whether the vessel or his employee failed to exercise due care.

The courts, however, have not understood this to be the rule. Rather, it appears well established that "the rule creating the duty to furnish a safe place to work does not apply where the prosecution of the work itself makes the place and creates the danger". *Filipek* v. *Moore-McCormack Lines*, 258 F. 2d 734 (C.A. 2), certiorari denied, 359 U.S. 927; *Byars* v. *Moore-McCormack Lines*, 455 F. 2d 587, 588 (C.A. 2). The facts here are clearly distinguishable from those involving hidden

hazards (cf. *Mesle* v. *Kea Steamship Corp.*, 260 F. 2d 747 (C.A. 3)); inadequate lighting (e.g., *Read* v. *United States*, 201 F. 2d 758 (C.A. 3); *Ross* v. *Steamship Zealand*, 240 F. 2d 820 (C.A. 1)); or lack of other basic safety equipment (e.g., *Lester* v. *United States*, 234 F. 2d 625 (C.A. 2); certiorari granted, 352 U.S. 880[29]) and do not afford a basis for recovery for failure to provide a reasonably safe place to work.[30]

## CONCLUSION

For the foregoing reasons, it is submitted that the judgment below should be affirmed.

Respectfully submitted.

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[29] Dismissed on settlement between the parties.

[30] See also the cases on which petitioner relies, discussed *supra*, pp. 40-41.